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Supreme Court, U.S
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No. 03-1450

In the Supreme Court of the United States

MOHAMMAD KHAN AND ERUM SYEDA,
Petitioners

v.

JOHN D. ASHCROFT,
UNITED STATES ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Petitioners' opening brief argued that the court of appeals erred in concluding that they were barred from seeking judicial review of the BIA's dismissal of their motion to reopen. Petitioners contend that the United States Court of Appeals for the Seventh Circuit's decision to dismiss their petition for review relying on *Plich v. INS* conflicts with the decision of the Ninth Circuit Court of Appeals in *Arrozal v. INS,* 159 F.3d 429, 431 (9th Cir. 1998).

Moreover, Petitioners argued that if the Seventh Circuit Court of Appeals found that it did not have jurisdiction to consider the matter, the case should have been transferred to the Court of Appeals for the Ninth Circuit, where jurisdiction was proper under INA § 309(c)(4)(D), 8 U.S.C. § 1252(b)(2), as "the petition for review shall be filed with the court of appeals for the judicial circuit in which the administrative proceedings before the special inquiry officer or immigration judge completed the proceedings." Both Petitioners and the government's attorney, in their Motion to Dismiss and in the Alternative to Transfer, agreed that a transfer would be proper in this case.

A. Judicial review of the motion to reopen is not precluded.

Congress has not divested the Courts of Appeals of jurisdiction to review a denial of all motions to reopen. Petitioner's contended that the Court did not address the merits of their request for relief pursuant to a provision of the INA established as discretionary by §309(c)(4)(E), and therefore review remains available.

Despite Respondent's contention to the contrary, this conclusion is consistent with the Ninth Circuit's holding in Arrozal v. INS 159 F.3d 429 (9th Cir. 1998) that §309(c)(4)(E) did not preclude review of a motion to reopen. In *Arrozal*, the merits of the denial of the motion to reopen did not involve a decision by the Board involving any of the discretionary provisions set forth in §309(c)(4)(E); rather, it involved a deportation order under INA § 241(a)(2). In the present case, the male petitioner was charged under Section 241(a)(1)(c)(1) of the

Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(1), for failing to comply with the conditions of the nonimmigrant status under which he was admitted. The female petitioner was charged under INA § 241(a)(1)(B) for remaining in the United States longer than permitted. The denial of the motion to reopen by the Board of Immigration Appeals involved the underlying deportation orders without even considering the merits of Petitioners' motion, not one of the listed discretionary provisions in §309(c)(4)(E).

Congress does not explicitly state that the courts of appeals are divested of jurisdiction to review the denial of relief under INA § 244(a), 8 U.S.C. § 1254(a) (repealed). The transitional rules of the IIRIRA, which apply to those cases in which proceedings commenced prior to April 1, 1997, and a final order of deportation or exclusion order was filed after October 30, 1996, state that there is no review of discretionary decisions under INA § 244 wherein the BIA has addressed the merits of the alien's request for relief. *Kalaw v. INS*, 133 F. 3d 1147, 1150 (9th Cir. 1997).

Petitioners argued, however, that direct judicial review remains over the statutory element and that, while the plain language of IIRIRA precludes the courts of appeals' direct judicial review of the Attorney General's discretionary decisions, assessing some of the aspects of statutory eligibility for suspension of deportation requires application of law to factual determinations. There are clearly aspects of statutory eligibility not involving the exercise of discretion wherein judicial review remains.

Additionally, Petitioners argued that the Courts of Appeals had jurisdiction to review the decision of the Board of Immigration Appeals for an abuse of discretion. "In this circuit, the BIA does not abuse its discretion and the denial of a motion to reopen will be upheld 'unless it was made without a rational explanation...' *Wijeratne,* 961 F.2d at 1348 *quoting Achacoso-Sanchez v. INS,* 779 F.2d 1260, 1265 (7th Cir. 1985). BIA abuses its discretion when it "fails to state its reasons and show proper consideration of *all* factors when weighing equities and denying relief." *Id.* at 849 (emphasis added) (quoting *Yepes-Prado v. INS,* 10 F.3d 1363, 1366 (9th Cir. 1993)). All the factors presented by Petitioners in their motion to reopen must be considered by the BIA in exercising its discretionary powers. *Villena v. INS,* 622 F.2d 1352, 1357-60 (9th Cir. 1990); *Tukhowinich v. INS,* 64 F.3d 460, 463-64 (9th Cir. 1995). As stated in Petitioners' opening brief, the BIA merely made a cursory and generalized analysis, not even addressing the favorable factors. *Jara-Navarrete v. INS,* 813 F.2d 1340, 1342 (9th Cir. 1986) (holding that the BIA's superficial mentioning of petitioner's favorable factors was an abuse of discretion).

These provisions do not interdict the Courts of Appeals consideration of the BIA's initial denial of Petitioners' applications for suspension of deportation or their motion to reopen.

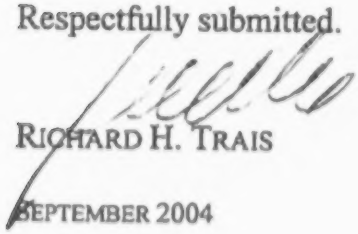
B. Petitioners did not oppose a change of venue to the Ninth Circuit.

Respondents contend that Petitioners opposed a change of venue to the Ninth Circuit. This contention is without merit, as Petitioners did not oppose a change of venue.

CONCLUSION

For the foregoing reasons and the reasons stated in the opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.



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